No. 14,552

United States Court of Appeals

For the Ninth Circuit

BLAIR HOLDINGS CORPORATION, a Corporation; BLAIR-ROLLINS & CO., INCORPORATED, a Corporation and BLAIR & CO., INC., OF NEW YORK, a Corporation,

Appellants,

vs.

BAY CITY BANK AND TRUST COMPANY, a Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable William E. Orr and James Alger Fee, Circuit Judges, To the Honorable James F. Carter, District Judge assigned to the United States Court of Appeals:

Comes now your petitioner and petitions for a rehearing in the United States Court of Appeals, after decision by said Court reversing judgment of the United States District Court, and in this connection respectfully shows:

GROUNDS FOR REHEARING.

1. That the trial court found, based upon substantial evidence, that title to the 1,600 shares of stock in dispute was vested in Bay City Bank and Trust Company and the evidence before the court conclusively proved title in the Bay City Bank and Trust Company of said stock. The trial court found by its findings of fact that from March 5, 1949, when Bay City Bank acquired title to the 20,000 shares of stock, to the present time, title in the 1,600 shares of stock on deposit with Dean Witter & Co. remained in Bay City Bank or Phillip Barnett, and that it was not intended by the escrow to transfer title to said stock. The Honorable United States Court of Appeals found that Bay City's right was only a pledged right, dependent on possession and that the stipulation creating the escrow entitled Blair to an award of said stock. Such decision controverts the evidence of vested title in Bay City Bank.

2. The legal authorities cited at page 6 of the United States Court of Appeals Decision herein are not in point and are not authority justifying the reversal of the trial court's decision herein.

LEGAL ARGUMENT.

1. FINDING OF THE TRIAL COURT THAT BAY CITY BANK HAD TITLE TO THE STOCK IS SUPPORTED BY EVIDENCE.

In Paragraphs 5, 6, 8 and 10 of the trial court's findings (pages 36 to 38 Tr. of Record) the trial court

traced legal title of the stock in Bay City Bank. That evidence, which will be related hereafter, substantially confirms the finding of the court and runs contrary to the United States Court of Appeals decision that Bay City's right was only a pledged right, dependent on possession.

On September 16, 1948, the Bay City Bank loaned Crofoot and the Tuckerman Rice Milling Company $35,000.00, evidenced by a promissory note, which was defendant's Exhibit E in evidence. This note was secured by a pledge of 20,000 shares of Blair Holdings Stock, which at the time was in the name of E. J. Crofoot. The note further provided for additional payment of 10% of the principal amount of the note for attorney fees, costs and other expenses which may be incurred in the event the bank was required to apply the stock to the settlement of the note. In the latter part of 1948, Crofoot and the Tuckerman Rice Milling Company were unable to pay the loan and Bay City Bank retained Phillip Barnett to secure the transfer of the pledged stock, cause same to be sold and to liquidate the loan, pursuant to the terms and conditions of the note and the retainer agreement between the bank and Phillip Barnett, 10% of said stock was to apply towards the cost of sale of said stock, attorneys fees incurred in causing same to be transferred, and other expenses. (See Trs. of Record, pp. 90-94.)

On March 5, 1949, Blair Holdings Corporation transferred the 20,000 shares of stock from the name

of E. J. Crofoot to the name of the Bay City Bank and Trust Company, after a court action was brought to procure said transfer, and this transfer of title in the stock is evidenced by Blair Holdings Co. invoices under date of March 5, 1949, and is supported by defendant's Exhibit A in evidence.

At the time the certificates of stock were pledged by Crofoot to the Bay City Bank, they bore Blair Holdings Corporation Certificate Nos. NHS-433, 434, 435 and 436, each certificate being in the amount of 5,000 shares, and standing in the name of E. J. Crofoot on the books of Blair Holdings Corporation. On March 5, 1949, after Blair transferred said stock to the Bay City Bank and Trust Company, pursuant to an order of the Superior Court of California, In and For the City and County of San Francisco, the stock certificates were in the amount of 5,000 shares each and bore Blair Holdings Corporation Certificate Nos. SHF 2805, 2806, 2807 and 2808 (Defts. Ex. A; Trs. of Record, pp. 51-53). Defendant's Exhibit G demonstrates that prior to March 11, 1949, Phillip Barnett had received the four certificates of 5,000 shares each, which had been transferred by Blair Holdings Corporation to Bay City Bank pursuant to court order, and that on March 11, 1949, Phillip Barnett transmitted said certificate numbers 2806, 2807 and 2808 to Dean Witter & Co. with instructions to sell same and deposit the proceeds in the Wells Fargo Bank to the credit of Bay City Bank & Trust Company. Said exhibits further demonstrated that Certificate No.

2805, in the amount of 5,000 shares, standing in the name of Bay City Bank & Trust Company had previously been transmitted to Dean Witter & Co. on March 9, 1949, by Phillip Barnett, and with the same instructions.

The evidence and documentary exhibits (Defendant's Ex. 7-B, 8-B, A, F and G) conclusively establish the fact that on March 5, 1949, 20,000 shares of stock which had previously stood in the name of E. J. Crofoot, was transferred by Blair Holdings Corporation to the Bay City Bank & Trust Company, and that title to said stock remained in the name of Bay City Bank & Trust Company, subject to the order of Phillip Barnett, with the proceeds of sale thereof to be deposited with the Wells Fargo Bank & Trust Company for the order of Bay City Bank & Trust Company.

Thus the evidence upon which the trial court based its findings of fact, above referred to, conclusively shows that the Bay City Bank and Trust Company had legal title to said stock and that it was subject to the instructions of their attorney, Phillip Barnett, and therefore the holding of the United States Court of Appeals that Bay City's right was only a pledged right, dependent on possession, is not supported by the evidence and is therefore erroneous.

The note executed by Crofoot and Tuckerman Rice Milling Company to the Bay City Bank on September 16, 1948 (Defts. Ex. E) was a contract requiring a payment not only of the principal sum of $35,000.00,

but also interest, and also fees to the extent of 10% of the principal sum of the note, and costs incurred in forcing the sale of the stock to pay the note in the event Crofoot and Tuckerman Milling Company could not pay same.

The customer ledger sheet of Dean Witter & Co. demonstrated that on March 10, 1949 to March 16, 1949, all but 1,600 shares of Bay City Bank Stock held by Dean Witter & Co. had been sold by the order of Phillip Barnett and the proceeds sent to the Wells Fargo Bank and Trust Company for the account of Bay City Bank. $35,239.96 was secured in this sale. The return of said sum covered only the principal obligation, but did not fully cover the interest nor the attorney fees and costs of suit incurred in causing the sale to be made.

The records disclose (Trs. of Record p. 99) that sale of the stock ceased on March 16, 1949, because of the fact that in selling the shares previously, the market and the stock had been depressed from a high of $2.25 a share to a low of $1.50 a share, and it was determined to withhold further sales of the stock for the time being. Further sale of the 1,600 shares of stock would be required to meet the attorney fees and costs of suit and interest payable, pursuant to the terms of the note. It is submitted that this evidence in the record adequately supports the finding of the trial court as to the title of the stock and completely negatives the holding of the Honorable Court that Bay City's right is only a pledged right.

The law relating to sufficiency of the evidence.

While the question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding may be presented to a reviewing court, the reviewing court's duty ceases when it is determined that there is some substantial supporting evidence which supports the findings and decision of the lower court. See *Bristol Estate,* 23 C (2) 221; *Atkinson Estate,* 206 C 617; *Hicks v. Ocean Shore R., Inc.,* 18 C (2) 773.

The courts have assigned several expressions as to what it means by substantial evidence, such as, the decision will not be disturbed if supported by "some evidence" (*Barry v. Coughlin,* 90 C 220); or by "any evidence" (*Belasco v. Chick,* 84 CA (2) 802); or by "any reasonable amount of evidence" (*Wikman Estate,* 148 C 642). The basic and inherent rule has been stated that there is an inherent difference between a trial court and a reviewing court in that the trial court is primarily a trier of fact and the appellate court a reviewer of errors at law. See *Baird Estate,* 193 C 225.

This same rule of the state courts is applicable in the federal courts where it has been held that if the evidence reasonably supports the judgment or verdict, the judgment will not be reversed on appeal. See *Mutual Life Insurance Company of N. Y. v. Frey,* 71 Fed. (2) 259. Similarly, a finding of fact by the court sitting without a jury is equivalent to a verdict and hence will be disturbed by the reviewing court only when it clearly is erroneous or shows that the judge

was influenced by improper motives or misunderstood the evidence. See *Dower v. Richards,* 151 U.S. 658. A trial court's finding, which has been attacked by lack of evidentiary support must be upheld by the Appellate Court where evidence as to facts specified therein was conflicting. See *Wilson v. United States,* 100 Fed. (2) 552. Further cases supporting the proposition that the trial court's finding of fact based on conflicting evidence is conclusive on appeal are found in the following cases:

The Bergen, 64 Fed. (2) 877;
Clemens v. Coppin, 61 Fed. (2) 552;
Lippman v. Romich, 26 Fed. (2) 601.

It is submitted herein that the evidence was clear and certain as to the title of said shares of stock being in the Bay City Bank & Trust Company. The exhibits and documents in evidence have hereinabove been cited to support said title. At best, it could be argued that a conflict of evidence developed by virtue of the stipulation. However, bearing in mind the Rules on Appeal and Decisions cited immediately above, where there is a conflict of evidence, the findings of the trial court must prevail. The trial court found that title to the stock was in Bay City Bank & Trust Company, subject to the order of Phillip Barnett. The exhibits in evidence above cited, demonstrate that the Blair Holdings Corporation did transfer said stock to Bay City Bank & Trust Company and that it was never again transferred by that bank to any other person. The Honorable Court herein recited at page 6 of its

decision that Bay City's right was only a pledged right, dependent on possession and that Bay City executed the Stipulation whereby Crofoot placed the shares in escrow. In fact, the stipulation for escrow and escrow instructions demonstrate that the shares were already on deposit in Dean Witter & Co. and that they were allowed to remain there by the Bay City Bank.

At page 4 of the Court's opinion, it was stated that the effect of the previous state court's order requiring a $50,000 bond was that Crofoot was indemnifying Blair for the transfer. In fact, the Bay City Bank & Trust Company was the concern which instituted action No. 383427 in the State Court in San Francisco, and procured the order of transferring the stock from Blair to the Bay City Bank, and it was Bay City Bank & Trust Company who was ordered by the State Court to post the $50,000 bond on appeal. By the order of the State Court, it was Bay City Bank & Trust Company, and not E. J. Crofoot, who indemnified Blair for the transfer of the 20,000 shares of stock. See Defts. Ex. 7-B and 8-B.

While the stipulation describes the 2,000 shares of stock "being the said 2,000 shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot", in fact the evidence conclusively demonstrated that Crofoot did not receive the 2,000 shares of stock, but that it remained held by Bay City Bank to satisfy attorney fees, costs, and any additional interest due, and it remained in Dean

Witter at all times. The evidence in the record further disclosed that because of the extreme complexity of the litigations between Bay City Bank, Blair, Crofoot, Rice, officials of the Bank of America, and other parties (involving some six actions), a simplification of names was effected.

The two disputing factions were designated for terms of simplicity "Crofoot Parties" and "Blair Parties". The Crofoot Parties involved Bay City Bank & Trust Company, E. J. Crofoot and Paul Rice, principally. The Blair Parties involved Blair Rollins of New York, Blair Holdings of California, Auto-Vend, Inc., Virgil Dardi, individual members of the Board of Directors of those corporations, and other individuals. Thus throughout these six preceedings which were arbitrated, everybody that was litigating against Blair were known as the Crofoot Parties, or Crofoot, and everyone litigating for Blair against the Bay City Bank, Crofoot and Rice were known as the Blair Parties, or Blair. The award of the arbitrator, the briefs presented to the arbitrator, proceedings before the arbitrator, and other documents involved in the litigation have all used the terms on numerous occasions when referring to the Blair Parties as Blair, or when referring to the Crowfoot Parties, as Crofoot. Therefore, the extreme emphasis placed by the Honorable Court on the statement in the escrow that Crofoot would escrow 2,000 shares of stock bears little weight, particularly when it is considered that these matters were before the trial court who heard the evidence and had all of the documents before it, and

based upon the testimony of witnesses and the documents before it, rendered a finding and decision that the stock was the property of the Bay City Bank & Trust Company.

At page 5 of this Court's decision reversing the lower court, it was stated:

> "there was no *express* determination of the ownership of the 2,000 shares."

The Court was referring to the decision of arbitration as affirmed by the District Court of Appeal of California. The Court has therefore established the fact that the issue of the 2,000 shares was not decided in the arbitration or in the District Court of Appeal, or otherwise, and the question of title to said stock therefore was properly before the trial court on the interpleader suit and the trial court did find title to be vested in the Bay City Bank in that decision and is supported by substantial facts which must be upheld on appeal.

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2. THE LAW CITED IN THE OPINION REVERSING JUDGMENT IS NOT IN POINT AND IS NOT PERTINENT TO THE ISSUES.

The Court found at page 6 of its opinion that Bay City's right to the stock was only a pledged right, dependent upon possession, and by executing the stipulation they gave up possession and therefore their pledged right. In support of this position, the Court cited the cases appearing on page 6 of its opinion to the effect that Texas law is in accord with the general

law in California, that by contract of pledge the pledgor does not part with his general right of property in the collateral.

In the Findings of Fact of the lower court, following submission of evidence, traced title of the stock from E. J. Crofoot, as a pledgor, to the Bay City Bank & Trust Company, finding the transfer of the stock from Crofoot to the bank was made in order to secure the liquidation and payment of the note which Crofoot and Tuckerman Rice Milling Company had executed to the Bay City Bank. The Court found that the transfer of the stock had been effected on March 5, 1949, by order of the Superior Court and that the Bay City Bank commenced, through its agent Phillip Barnett, to liquidate the stock in satisfaction of the obligation owed by Crofoot and the Tuckerman Rice Milling Company. The substance of that evidence is obvious that the 20,000 shares of stock were transferred by Crofoot to the Bay City Bank & Trust Company in full satisfaction of the claims on the $35,000 note and to secure the additional cost of interest, court costs and attorney fees in procuring the transfer of the stock. Crofoot having pledged the stock impliedly warranted that it could be transferred, and when the Blair Company posted a block on the transfer, the Bay City Bank & Trust Company was entitled to employ counsel to procure its transfer (being a bona fide purchaser) and is entitled to the cost of attorneys and Court in forcing the transfer of the stock to liquidate the obligation due to the bank. This evidence was all before the Court when it ren-

dered its finding that title to the 20,000 shares was vested in the Bay City Bank & Trust Co. Therefore, the Bay City Bank, after March 5th, no longer was a pledgor dependent upon possession, but owned the stock as payment for the obligation due to it.

It is therefore submitted that the rules of law pertaining to pledgor and pledgee are not applicable, since there was, in effect a sale and transfer of the stock in 1949 to the Bank by Crofoot to satisfy his debt, and it was not until five or six years later that Blair Holdings Corporation sought to execute upon the stock. The trial court found that the title had been transferred to the Bay City Bank some five to six years prior thereto and, therefore, they were the owners in fee of said stock, subject to the order of Phillip Barnett.

Further, the cases cited in the Court's opinion of *San Angelo Hilton Hotel v. B. B. Hail Building Corp.,* Tex. Civ. App., 60 S.W. (2) 1049, and *Cross v. Eureka Lake,* 73 C 302, are not in point. Those cases are discussed at pages 13 to 16 of the Appellee's Reply Brief on file herein. The *San Angelo Hilton Hotel Company* case is not even a pledge case. It involves assignment of rent and leases. The *Cross v. Eureka* case is not in point because that was a case by a pledgor against the pledgee to recover income from the pledged property which was not required to liquidate the obligation owed by the pledgor. In short, that case would only be in point in the event Crofoot was suing the Bay City Bank & Trust Company herein. However, a third party is seeking to sue the

pledgee to recover stock which the pledgee took in lieu of cash for a loan of money which the pledgee had made. Further, the *Cross* case is not in point, since in the *Cross* case the amount of income which had come in on the stock which had been pledged during the period the loan was outstanding far exceeded the amount of money required to liquidate the loan, and therefore, the pledgor was entitled to this overage of money. However, in the *Crofoot* case, the 20,000 shares of stock was barely sufficient to meet the principal obligation of $35,000, together with the cost of suit and attorney fees that the bank was required to incur in order to procure the liquidation of the stock, in order to pay the loan. Further, the evidence conclusively demonstrated at page 99 of the transcript that when the Bay City Bank started to sell the stock, it was valued at $2.25 a share, and in a matter of seven days, it had dropped to $1.50 a share by virtue of the litigation pending in the sales of stock. For that reason, sales ceased on March 16th. This evidence is in the Dean Witter stock ledger sheet which was in evidence and was testified to by Mr. Barnett at page 99 of the transcript. At $1.50 a share, 20,000 shares would not have even paid the principal obligation on the loan.

IN SUMMARY.

It is respectfully submitted that the findings of fact of the trial court were adequately and substantially supported by the evidence and the exhibits introduced at the time of the trial and which were before

the United States Court of Appeals. Further, said evidence conclusively demonstrated that title to the stock was in the Bay City Bank & Trust Company, having been transferred to that bank in March, 1949, some five or six years prior to the time the Blair Holdings Corporation sought to execute upon said stock. Further, this Court on review found that the State Court and the arbitrator did not expressly determine the title to said stock, and therefore, the determination of title in said stock by the lower Court herein (which determination is based on substantial evidence) adequately determined the issue. Further, the finding by the reviewing Court herein that Bay City Bank was merely a pledgee, when said pledge had been reduced to a transfer of the stock in March 1949 was wholly unsupported by the evidence and is an erroneous conclusion. Also, the cases cited by the reviewing court in support of that position, either do not relate to a pledgor-pledgee relationship as such, or are not in point factually.

It is respectfully submitted that a re-hearing herein should be granted by this Court to the appellee who prevailed in the lower Court, and that following said rehearing the decision of the lower Court should be affirmed.

Dated, San Francisco, California,
July 8, 1956.

BARNETT & ROBERTSON,
RODNEY H. ROBERTSON,
Attorneys for Appellee and Petitioner.

Certificate of Merit

The undersigned, one of the attorneys of record for Appellees, does hereby certify that in his opinion this petition for rehearing is meritorious and that said petition is not interposed for purpose of delay.

Dated, San Francisco, California,
July 8, 1956.

Rodney H. Robertson.